



protected service area ("PSA"). Third, the Commission should specifically incorporate into its rules the policy it restored in the *Two-Way Order*<sup>2</sup> permitting lessees of MDS and ITFS capacity to hold booster station authorizations, subject to certain safeguards.<sup>3</sup>

The rule changes proposed by BellSouth will increase the usefulness and value of ITFS spectrum, to the overall benefit of ITFS licensees, wireless operators that lease ITFS excess capacity, and the public. In each case, BellSouth's proposals reflect a careful balancing of interests consistent with the *Two-Way Order*, where the Commission specifically stated that:

By enhancing the flexibility of the ITFS spectrum, our revised Rules should increase the value of that spectrum to ITFS licensees both for their own use and as a leasable asset. . . . Although there is some chance that implementation of digital two-way operations may restrict the ability of ITFS licensees of new stations to provide service due to the interference protections we adopt, we believe this risk of restricting some future service is greatly outweighed by the enormous benefits to existing ITFS licensees, both in increasing the value of their licensed spectrum and in permitting them to provide an array of new services.<sup>4</sup>

With this premise in mind, BellSouth urges the Commission to reject the unfounded and misguided arguments offered in opposition, and to adopt its proposed rule changes and refinements.

---

<sup>2</sup> *Report and Order, Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions; Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 13 FCC Rcd 19,112 (1998).

<sup>3</sup> In addition, BellSouth asked the Commission to make clear in its rules that the channel shifting rules apply to analog systems as well as digital systems. See Petition at 15. This request for clarification was echoed by the over 110 parties that were the original petitioners in this proceeding (the "Petitioners") and is not opposed. See Petition for Further Reconsideration of Petitioners filed on November 23, 1999 at 14-15.

<sup>4</sup> *Two-Way Order*, 13 FCC Rcd at 19,117 (footnotes omitted).

## Discussion

### **I. THE COMMISSION SHOULD PERMIT ITFS LEASE PROVISIONS THAT REQUIRE THE LEASE TO BE ASSIGNED WHEN THE LICENSE IS ASSIGNED.**

Instructional Telecommunications Foundation, Inc. ("ITF") and Catholic Television Network ("CTN") take issue with BellSouth's proposal, supported by other parties in this proceeding, to permit ITFS lease provisions requiring the lease to be assigned upon an assignment of the underlying station license. ITF acknowledges that the lease assignment prohibition "probably" diminishes the commercial value of ITFS spectrum,<sup>5</sup> but nonetheless argues that this is "appropriate in view of the primary purpose of educational spectrum, which has never been to secure financial return."<sup>6</sup> ITF further maintains that granting ITFS licensees and lessees the freedom to negotiate whether a lease can be assigned to a successor licensee would "bind a new ITFS licensee to a commercial agreement the educator never would have accepted for a period that can approach 15 years."<sup>7</sup> Similarly, CTN posits that the educational mission of an incumbent licensee may differ from its successor, which should not be bound by the contract with the lessee.<sup>8</sup>

---

<sup>5</sup> Consolidated Opposition to Petitions for Further Reconsideration and Petition for Clarification and Further Reconsideration of ITF filed on February 9, 2000 ("ITF Opposition") at 2.

<sup>6</sup> *Id.* at 3. In attempting to challenge BellSouth's arguments that other services are not constrained by artificial prohibitions on agreement assignment, ITF points out that these other services "do not share ITFS's instructional mission, and that other aspects of ITFS regulation are not as central as [*sic*] its very purpose." *Id.* at 2. ITF conveniently ignores BellSouth's analogy of ITFS to the other non-commercial educational broadcast services, which also have an educational mission and requirements, and are not encumbered with restrictions on the ability to assign agreements with respect to station airtime (such as network affiliation agreements) or other agreements affecting station operation. *See* Petition at 10-11.

<sup>7</sup> *Id.*

<sup>8</sup> *See* Comments on Petitions for Further Reconsideration of CTN filed on February 10, 2000 ("CTN Comments") at 6. Citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), CTN also suggests that  
(continued...)

Stripped of the hyperbole on which ITF and CTN base their arguments, it is readily apparent that ITF and CTN are simply asking the Commission to blindly substitute their own judgment of what is best for ITFS for the individual judgments of all other ITFS licensees. BellSouth has demonstrated that the inability of ITFS licensees and commercial operators to negotiate freely on the issue of capacity lease assignment introduces meaningful uncertainty in the lease relationship. Operators, which value ITFS spectrum on a host of factors,<sup>9</sup> must as a matter of basic business analysis attach less value to spectrum if a negotiated long-term lease can be shortened unilaterally.<sup>10</sup> This uncertainty, in turn, reduces the potential amount and types of

---

(...continued)

BellSouth's proposal should not be considered by the Commission because the Commission already has addressed this issue in the *Reconsideration Order*. *WWIZ* is inapposite to the instant situation because it addresses petitions for reconsideration filed pursuant to Section 1.106, not petitions for reconsideration of rule making orders under Section 1.429. Contrary to CTN's misunderstanding, the Commission retains the discretion to consider petitions for further reconsideration of issues addressed in the *Reconsideration Order*.

<sup>9</sup> These include but are not limited to the length of the lease, cost of equipment, amount of lease payments, the facilities and airtime that the ITFS licensee requires for its instructional purposes, parameters and coverage potential of the ITFS station, and commercial attractiveness of the particular market.

<sup>10</sup> As the Petitioners point out in their comments supporting BellSouth, this undermining of the certainty of ITFS lease term lengths "is impossible to square with [the Commission's] own recognition in the [*Two-Way*] *Order* that 'the conversion to digital operations . . . will entail a substantial increase in costs,' and that as a result, fifteen year excess capacity lease terms will be necessary because 'the investment community will require even far greater comfort regarding the long-term availability of excess capacity on ITFS channels.'" Consolidated Comments and Partial Opposition of Petitioners filed on February 10, 2000 at 3. As the Petitioners rhetorically ask, "[i]f the Commission recognizes on one hand that longer-term leases are necessary to justify investment in ITFS spectrum, how can it on the other hand allow an ITFS licensee to walk away from its obligation to provide the operator access to the spectrum throughout the term?" *Id.*

Incredibly, ITF argues that the investments made by BellSouth and others in the wireless industry "puts to rest any suggestions that such a policy inhibits commercial interest in ITFS spectrum." ITF Opposition at 2, n.2. This is a gross oversimplification of the factors that operators consider in investing in markets as a whole. ITF sidesteps what is directly relevant here  
(continued...)

consideration that operators can offer, and ITFS licensees can bargain for, in leasing ITFS excess capacity. While this loss of negotiating flexibility and value for ITFS educators is damaging enough, real harm may continue after an ITFS licensee actually assigns its license. In such case, the successor licensee faces the additional risk and expense of negotiating a new lease and, if unsuccessful, it must then attempt to establish a separate operational existence without the benefit of the termination protections and transition rights in the lease, since it would not have become a party to the lease. Depending on the market dynamics at the time, this situation could place the successor ITFS licensee at a great disadvantage.<sup>11</sup> Essentially, ITF and CTN would trade the numerous benefits of certainty in an existing lease for the vague and theoretical benefits they argue might possibly inure to a hypothetical successor having different educational objectives.

Far from the "fresh start" that ITF imagines a successor licensee enjoying,<sup>12</sup> the assignee of an ITFS license takes the license "as is." A successor licensee is "encumbered" by the technical parameters of the license, including the locations of its transmission and receive sites, the remaining term of the license and a number of other "restrictions" that are the *sine qua non* of being a license holder. Yet ITF and CTN would cast aside the twin hallmarks of this proceeding -- promoting flexibility and enhancing the value of ITFS spectrum -- in exchange for illusory benefits that a successor licensee might obtain in some hypothetical situations that might never exist. This fantasy comes at the very real expense of existing ITFS licensees, operating their stations here and now that, in reality, as fiduciaries in pursuit of their educational missions, seek

---

(...continued)

-- valuation of ITFS leases. As BellSouth previously observed, and ITF conveniently ignores, the "increased risk [of losing system capacity] has the corresponding effect of limiting the amount of compensation an operator can reasonably provide to an ITFS licensee for the excess capacity." Petition for Reconsideration of BellSouth filed on December 28, 1998 at 15.

<sup>11</sup> This disadvantage may be particularly acute in the future environment of two-way operation where, to assure a "seamless transition" at the end of lease, the Commission requires that comparable equipment be made available to the ITFS licensee. *Two-Way Order* at 19,179.

<sup>12</sup> ITF Opposition at 4.

the most value for the use of their excess capacity.

Resolution of this critical issue boils down to balancing the undisputed need of contracting parties to have certainty regarding the term of their relationship versus the potential "benefit" to a possible future licensee. Even assuming there is any scintilla of truth to ITF's and CTN's arguments, the Commission's very words in this rule making bear repeating: "we believe this risk of restricting some future service is greatly outweighed by the enormous benefits to existing ITFS licensees, both in increasing the value of their licensed spectrum and in permitting them to provide an array of new services."<sup>13</sup> Properly considered in the context of the Commission's policies central to this proceeding, it is clear that any potential limitations that a license assignee might encounter are substantially outweighed by the present value of certainty that a negotiated lease term will be honored and that both contracting parties will enjoy the full benefits of their bargain. The Commission should reconsider its policy and permit ITFS educators to have the freedom and flexibility to bargain for provisions requiring the lease to be assigned to a successor licensee.

## **II. LICENSEES OF POINT-TO-POINT ITFS STATIONS SHOULD NOT BE AFFORDED PROTECTED SERVICE AREAS.**

The National ITFS Association ("NIA") and CTN oppose BellSouth's proposal to exclude point-to-point ITFS stations from rules granting all ITFS stations a circular 35-mile radius PSA. While NIA agrees with BellSouth that licensees of secondary ITFS stations should not be afforded PSA protection,<sup>14</sup> it argues that all primary ITFS stations, even those operating strictly point-to-point, should enjoy such protection.<sup>15</sup> CTN, reiterating arguments it made in the reconsideration round of this proceeding, would accept such restrictions if two conditions were imposed: first,

---

<sup>13</sup> *Two-Way Order* at 19,117.

<sup>14</sup> *See* Opposition to and Comments on Petitions for Reconsideration of NIA filed on February 10, 2000 ("NIA Opposition") at 2.

<sup>15</sup> *Id.* at 3.

where a licensee holds only four channels, the PSA should attach to all four channels "even if one or two are used only for point-to-point service;" and second, if a point-to-point station "legitimately" needs to add a receive site and is prevented from doing so, the interfering station must pay for a "replacement link."<sup>16</sup> Neither NIA's nor CTN's position is persuasive.

NIA argues that BellSouth proposes to draw the line between the protected and the unprotected in the wrong place, stating that interference protection should be determined solely by the regulatory status of the licensee (*i.e.*, primary or secondary), rather than by the transmission parameters of a particular station.<sup>17</sup> NIA's analysis completely ignores the detrimental effect a point-to-point station, as narrowly defined by BellSouth, would have on the ability of other ITFS stations to modify and upgrade their facilities to provide advanced services. Under the Commission's new rules, an ITFS station operating a point-to-point station would be protected within a 35-mile radius, even though the licensee has no apparent intention to ever provide point-to-multipoint service.<sup>18</sup> Meanwhile, adjacent-channel licensees, and co-channel

---

<sup>16</sup> CTN Comments at 7.

<sup>17</sup> NIA believes that "[i]n recognizing that ITFS STL stations are not the most efficient use of channels, ITFS STL stations have *traditionally* been licensed on a secondary basis," and thus "[t]he line already exists between primary and secondary STL stations." NIA Opposition at 2 (emphasis added). The problem is that this *tradition* has not been universally honored in practice, giving rise to some STL and other point-to-point stations being licensed as primary stations. It is these aberrations that should not receive PSA protection.

<sup>18</sup> An ITFS licensee operating in point-to-point mode, with an intention to operate in the future with point-to-multipoint service, presumably by now would have evidenced such interest by filing a modification application seeking such facilities. See Petition at 14. Elimination of PSA protection for licensees operating in point-to-point mode would affect only those licensees that are not already applicants for or holders of construction permits for point-to-multipoint operation. Licensees of point-to-point facilities will continue to have the ability to file for point-to-multipoint services and obtain PSA protection in the future, through the same procedural opportunities to modify facilities available to all ITFS licensees. *Id.* at 14, n.25.

ITFS licensees in neighboring markets, operating in full point-to-multipoint service, could be blocked from modifications and improvements. Thus, a single licensee, underutilizing the ITFS spectrum with no desire to provide wide-area service, could prevent numerous other ITFS licensees from maximizing their ITFS spectrum in the manner intended by the Commission and envisioned by the *Two-Way Order*.

Contrary to NIA's claim, the demarcation BellSouth draws is easy to administer and implement. BellSouth has cast the requested revision in the most narrow manner possible, seeking only a very limited exception to the interference protection rules to prevent a point-to-point station from frustrating the objectives of its neighbors. For these purposes, BellSouth has suggested a definition of a "point-to-point station" with the following characteristics: (1) a single designated receive site; (2) use of a parabolic or other directional transmit antenna; and (3) the lack of an excess capacity lease agreement with a commercial operator.<sup>19</sup> Under any analysis, this definition excludes from protection only a very small number of licensees, those with the grossly disproportionate ability to adversely affect neighboring stations. Although there are certainly other circumstances, as NIA argues, where a limited ITFS facility would block nearby stations,<sup>20</sup> BellSouth seeks to eliminate undue protection only in the most glaring situations. This limited exclusion proposed by BellSouth will go far to eliminate a most obvious example of imbalance, spectral inefficiency and overprotection.

CTN's proposal of further conditions would circumvent and complicate the simple exclusion BellSouth urges the Commission to adopt, and therefore should be rejected. The first suggested restriction -- that an ITFS licensee with four channels, with one or two of them operating point-to-point, should get a PSA for all -- would overprotect some of the licensee's

---

<sup>19</sup> *Id.* at 12, n.21.

<sup>20</sup> NIA Opposition at 3.



channels for no apparent reason. As BellSouth stated in refuting these arguments previously, and as the above discussion illustrates, "it would be spectrally inefficient to authorize a larger area for interference protection than the particular channel requires."<sup>21</sup> CTN's second suggestion, which would require a licensee to pay for a replacement link if at some future time the point-to-point licensee "legitimately" wanted to add a receive site, would place the future rights of the point-to-point ITFS licensee ahead of those of other ITFS licensees that legitimately take advantage of opportunities to enhance their facilities. An ITFS station that obtains interference protection rights *vis a vis* a point-to-point station really obtains nothing if in the future it may have to pay some undefined sum for a replacement link. For all of these reasons, BellSouth's proposed rule revision should be adopted.

### **III. THE COMMISSION SHOULD REJECT PROPOSALS THAT WOULD PREVENT CAPACITY LESSEES FROM HOLDING BOOSTER STATION LICENSES.**

NIA, ITF and CTN seek reconsideration of the Commission's decision in the *Reconsideration Order* restoring the right of lessees of ITFS and MDS capacity to hold booster station licenses, subject to certain conditions. These parties suggest that the mere "offer" to assign the booster license to the main station licensee at lease termination or expiration is insufficient and, further, that lessee eligibility constitutes a reallocation of ITFS spectrum for commercial purposes because the educational programming requirements can be circumvented.<sup>22</sup>

BellSouth addressed these objections in its Opposition by proposing specific modifications to the safeguards and the rules themselves.<sup>23</sup> First, to alleviate concerns regarding the uncertainty

---

<sup>21</sup> See Consolidated Reply to Oppositions to Petition for Reconsideration filed by BellSouth on February 18, 1999 at 8.

<sup>22</sup> See NIA Opposition at 4; ITF Opposition at 5; CTN Comments at 2.

<sup>23</sup> Consolidated Opposition to Petition for Further Reconsideration of BellSouth filed on February 10, 2000 ("Opposition") at 5-6.

associated with an "offer" to assign the booster authorization, BellSouth has urged that the co-channel booster station license should be assigned *automatically* to the main station licensee, by and upon written notice to the Commission, when the lease terminates or expires. Second, to satisfy concerns about the reallocation of ITFS spectrum for commercial purposes, BellSouth suggested that the Commission clarify that a lessee licensed on an ITFS booster station must comply with the minimum educational programming requirements for booster stations. These refinements fully address the concerns raised by NIA, ITF and CTN.

BellSouth reiterates that licensing of booster stations to capacity lessees is a voluntary decision resting solely with the discretion of the licensee of the main station. If the licensee does not wish to have its commercial operator lessee licensed on its booster station, it has the unilateral right to disallow it.

#### **Conclusion**

In view of the foregoing, BellSouth urges the Commission to adopt the proposed rule and policy changes discussed in BellSouth's Petition and above.

Respectfully submitted,

**BELLSOUTH CORPORATION**  
**BELLSOUTH WIRELESS CABLE, INC.**

By: Thompson T. Rawls, II by SEC  
William B. Barfield  
Thompson T. Rawls, II  
BellSouth Corporation  
1155 Peachtree Street, N.E.  
Suite 1800  
Atlanta, Georgia 30309  
(770) 673-2827  
Their Attorneys

February 22, 2000

**CERTIFICATE OF SERVICE**

I, Victor Onyeoziri, with the law firm of Rini, Coran & Lancellotta, P.C., do hereby certify that the foregoing "Consolidated Reply To Oppositions to Petitions for Further Reconsideration" of BellSouth Corporation and BellSouth Wireless Cable, Inc. was served on the below-listed parties by First Class U.S. Mail this 22nd day of February, 2000.

Paul J. Sinderbrand, Esq.  
William W. Huber, Esq.  
Robert D. Primosch, Esq.  
Wilkinson Barker Knauer, LLP  
2300 N Street, N.W., Suite 700  
Washington, D.C. 20037-1128

Todd D. Gray, Esq.  
Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Avenue, N.W., Suite 800  
Washington, D.C. 20036-6802

William D. Wallace, Esq.  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2595

Edwin N. Lavergne, Esq.  
J. Thomas Nolan, Esq.  
Shook Hardy & Bacon L.L.P.  
Hamilton Square, Suite 800  
600 14th Street, N.W.  
Washington, D.C. 20005-2004

Steven C. Schaffer, Esq.  
Schwartz Woods & Miller  
1350 Connecticut Avenue, N.W., Suite 300  
Washington, D.C. 20036-1717

John B. Schwartz, President  
Instructional Telecommunications Foundation, Inc.  
P. O. Box 6060  
Boulder, Colorado 80306

  
Victor Onyeoziri